No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY (a corporation),
Appellant,
vs.
THE HOSTETTER COMPANY (a corporation),
Appellee.

Supplemental Petition for Rehearing.

R. H. COUNTRYMAN,
Solicitor for Appellant.

PERNAU PRESS, 543 CLAY ST., S. F.

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To the Honorable the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

Samuel Bros. & Company, a corporation, appellant in the above entitled suit, respectfully calls the Court's attention to the decision of the Supreme Court of the United States, in the case of *Clinton E. Worden & Company*, petitioner, against the *California Fig Syrup Company*, respondent, opinion filed January 5th, 1903, and numbered 36 on the October term of 1902, in which that distinguished tribunal says:

" The Courts below concluded, upon the evidence, " that the defendants sold a medical preparation named, " marked and placed, in imitation of the complainant's

" medicine, for the purpose and with the design and " intent of deceiving purchasers and inducing them to " buy defendant's preparation instead of the complain- " ant's. We see no reason to dissent from that conclu- " sion, and if there were no other questions in the case, " we should be ready to affirm the decree, awarding a " perpetual injunction and an account of the profits " and gains derived from such unfair and dishonest " practices.

" Another ground, however, is urged against the " complainant's right to invoke the aid of a Court of " equity, in that the California Fig Syrup Company, " the complainant, has so fraudulently represented to " the public the nature of its medical preparation that " it is not entitled to equitable relief.

" Some Courts have gone so far as to hold that Courts " of equity will not interfere by injunction in contro- " versies between rival manufacturers and dealers in so- " called quack medicines (*Fowle* v. *Spear*, Circuit Court " of the United States for the Eastern District of Penn- " sylvania, Pennsylvania Law Journal, vol. 7, p. 176; " *Heath* v. *Wright*, 3 Wall. Jr. 141; *Fetridge* v. *Wells*, " 4 Abb. Pr. 144).

" It may be said, in support of such a view, that " most, if not all, the states of this Union have enact- " ments forbidding and making penal the practice of " medicine by persons who have not gone through a " course of appropriate study, and obtained a license " from a board of examiners; and there is similar legis- " lation in respect to pharmacists. And it would seem " to be inconsistent, and to tend to defeat such salutary

" laws, if medical preparations, often and usually con-
" taining powerful and poisonous drugs, are permitted
" to be widely advertised and sold to all who are willing
" to purchase. Laws might properly be passed limit-
" ing and controlling such traffic by restraining retail
" dealers from selling such medical preparations, except
" when prescribed by regular medical practitioners.

" But we think that, in the absence of such legisla-
" tion, Courts cannot declare dealing in such prepara-
" tions to be illegal, nor the articles themselves to be
" not entitled, as property, to the protection of the law.

" We find, however, more solidity in the contention,
" on behalf of the appellants, that when the owner of a
" trade mark applies for an injunction to restrain the
" defendant from injuring his property by making false
" representations to the public, it is essential that the
" plaintiff should not in his trade mark, or in his adver-
" tisements and business, be himself guilty of any false
" or misleading representation; that if the plaintiff
" makes any material false statement in connection
" with the property which he seeks to protect, he loses
" his right to claim the assistance of a Court of equity;
" that where any symbol or label claimed as a trade
" mark is so constructed or worded as to make or con-
" tain a distinct assertion which is false, no property
" can be claimed on it, or, in other words, the right to
" the exclusive use of it cannot be maintained."

In the suit in which this petitioner is appellant, the original transcript was filed on December 30th, 1901, the printed transcript of two volumes was filed February 15th, 1902. Appellant's brief was filed March 3, 1902.

Appellee's brief was filed March 11, 1902. The case was argued March 12, 1902. Appellant's supplemental brief was filed March 27, 1902. Appellee's supplemental brief was filed April 21, 1902. The opinion was filed October 6, 1902. The petition for re-hearing was filed November 20th, 1902.

By reason of the somewhat voluminous record and written arguments before the Court, we hesitate about considering at any length the application of the decision of *the California Fig Syrup case* to our case.

The testimony in our case demonstrates that Hostetter's preparation is a quack medicine. That it is simply an alcoholic stimulant corresponding to an elaborate whiskey cocktail, containing more ingredients than the drink commonly known by that name (page 340).

That it is contra-indicated by all reputable medical authors and physicians in the diseases which it is advertised to cure. That in many of said diseases it would prove fatal to the patient. That taken in the manner prescribed on the labels, and in the almanacs and other advertising matter of appellee, it would result in chronic alcoholism. That the quantity prescribed to be taken before each meal, to-wit, one wine glass full, is an amount largely in excess of what would be taken by an ordinarily healthy man at one time in a social drink or as an "appetizer". That the quantity prescribed if taken by a woman afflicted with any of the diseases it is advertised to cure would be exceedingly injurious to her disorders, and create an alcoholic taste that would inevitably prove detrimental to her moral and social standing.

We all recognize that in modern society the indulgence in alcohol by men is decreasing, and that its indulgence by women is increasing. That the man who has a tendency towards excess in alcoholic stimulants loses social caste. That men no longer drink heavy Port or old Madeira. That it is not fashionable for men to drink to excess. That the spirit of *bon comradarie* is leading fashionable women to the consumption of a larger quantity of alcoholic stimulants than is beneficial for their highly emotional natures.

There cannot be two opinions on the subject of appellee's preparation being a fraud on the public. It is recommended to the male and the female, particularly to the female. Appellee advertises it as "a mild and safe invigorant and corroborant for delicate females", and also recommends that "persons in a debilitated state should commence by taking small doses and increase with their strength". Appellee evidently means the strength of the appetite, and not the strength of the patient's physique, for there is no medical work published but that states in unqualified terms that alcohol should be avoided by dyspeptics and persons afflicted with liver trouble. Indeed, we do not need scientific authority on this point; it is well understood by every person of mature years.

Man is a free moral agent, and may consume such liquors as his judgment or position in society may dictate, but there is much reason in the opinion of Mr. Justice Shiras that laws might properly be passed limiting and controlling the traffic by retail dealers of medical preparations, except when prescribed by regular

medical practitioners. This is unquestionably true when an alcoholic stimulant in the guise of a medicine is introduced into a man's home to sap the morality of the female members of his family, and to destroy the virility of his children. Such commercialism shocks the conscience of any thinking man. We all recognize that a drunken man is disagreeable, while a drunken woman is abhorrent. All the graces of a woman's mind and body are destroyed when the alcoholic habit overcomes her strength, and we think it the duty of a Court of Equity, clothed as it were with the attributes of God himself to examine and purge the minds and consciences of men, to emphatically stamp its disapproval upon the nefarious practice of ruining the morals and health of American manhood and American womanhood under the guise and cloak of a medical preparation guaranteed to cure the very ills which it aggravates.

We respectfully submit that under the decision of the United States Supreme Court in the *Fig Syrup case*, the petition for a rehearing herein should be granted.

R. H. COUNTRYMAN,
Solicitor for Appellant.